Supreme Court, U.S.
FILED

00 987 DEC 15 2000

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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

SAROEUT OURK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	4
Argument	8
Conclusion	9
Appendix A	1a
Appendix B	2a
Appendix C	5a

TABLE OF AUTHORITIES

Cases:

Ma v. *Reno*, 208 F.3d 815 (9th Cir.), cert. granted, 121 S. Ct. 297 (2000)	7, 8
Phan v. *Reno*, 56 F. Supp.2d 1149 (W.D. Wash. 1999)	6
Zadvydas v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), cert. granted, 121 S. Ct. 297 (2000)	8

Statutes and regulation:

8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998)	4
8 U.S.C. 1231(a) (Supp. IV 1998)	2
8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998)	2, 7
8 U.S.C. 1231(a)(6) (Supp. IV 1998)	3, 5, 7, 8
28 U.S.C. 2241	6
Cal. Penal Code § 261(a)(3) (West 1993)	5
8 C.F.R. 3.39	5

In the Supreme Court of the United States

No.

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v.

SAROEUT OURK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The order of the district court granting the petition for writ of habeas corpus (App., *infra*, 2a-4a) and the report and recommendation of the magistrate judge adopted by the district court (App., *infra*, 5a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **Detention and removal of aliens ordered removed**
>
> **(a) Detention, release, and removal of aliens ordered removed**
>
> **(1) Removal period**
>
> **(A) In general**
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> **(2) Detention**
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and,

> if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Cambodia. App., *infra*, 7a. He entered the United States as a refugee on June 15, 1984, and, on March 18, 1987, adjusted his status to lawful permanent resident. *Ibid.*; Administrative Record (A.R.) R25, L28.

On July 1, 1999, the Immigration and Naturalization Service (INS) served respondent with a notice to appear for removal proceedings, charging respondent with being subject to removal from the United States under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998), because he had been convicted of an aggravated felony, which includes the crime of rape as well as any crime of violence for which the term of imprisonment imposed was one year or more. A.R. L8, L15-L16. That charge was based on respondent's conviction on March 8, 1993, on a plea of guilty in state court of rape by use of drugs, for which he was sentenced to three years' imprisonment. A.R. L15-L16.

Respondent's rape conviction arose out of a seventeen-count criminal complaint filed against respondent and two others, charging respondent with two counts of rape by use of drugs, two counts of forcible rape while acting in concert, and two counts of commission of lewd acts upon a child. A.R. R73-R85. Respondent's two co-defendants were similarly charged and were further charged with kidnapping, kidnapping with intent to rape, and being armed with a firearm during a felony. *Ibid.* That complaint was based on the kidnapping of a thirteen-year-old girl and the repeated rape and sexual assault of the girl by respondent and

his two co-defendants, who were fellow gang members. 3/9/2000 Custody Review Worksheet 2 (included in Exh. 1 to Objections to Magistrate's Report and Recommendation) (Custody Review Worksheet). By entering a plea of guilty to rape by use of drugs, in violation of California Penal Code § 261(a)(3) (West 1993), respondent admitted to raping the child when she "was prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of" respondent. A.R. R81.

After serving eighteen months of his prison term, respondent was released on parole but was returned to custody within a month based on a parole violation. App., *infra*, 7a; A.R. R134. He was reparoled in February 1998, but he again violated parole when he was arrested on October 3, 1998, for obstructing an officer, and he was again returned to prison. App., *infra*, 7a; Custody Review Worksheet 1; A.R. R26.

Respondent was released into the custody of the INS on July 1, 1999. App., *infra*, 7a; Custody Review Worksheet 1.

b. On August 3, 1999, an immigration judge found that respondent was subject to removal as charged. A.R. L6. The immigration judge ordered that respondent be removed to Cambodia. *Ibid.* Respondent waived appeal to the Board of Immigration Appeals, thereby rendering his removal order final. *Ibid.*; see 8 C.F.R 3.39.

c. The INS requested travel documents for respondent from Cambodia on August 9, 1999, A.R. R3, and again on March 13, 2000. Custody Review Worksheet 1. The Cambodian government has not responded to the requests. See *ibid.* The INS continued to detain respondent under 8 U.S.C. 1231(a)(6) (Supp. IV 1998),

subject to periodic administrative reviews of his custody. The INS notified respondent that it would be reviewing his custody status and conducted a custody assessment interview on November 24, 1999. Custody Review Worksheet 2. On March 15, 1999, the INS informed respondent that he would be continued in INS detention because he had not demonstrated that he would not be a flight risk or a danger to the community if released. 3/15/2000 Letter from Assistant District Director Morones (noting lack of rehabilitation, lack of credible statements of remorse, nature of criminal act, and lack of family ties or equities) (included in Exh. 1 to Objections to Magistrate's Report and Recommendation) The INS informed respondent that his custody would be reviewed next on May 2, 2000. *Ibid.*

2. a. Meanwhile, on November 23, 1999, respondent filed a petition for habeas corpus relief under 28 U.S.C. 2241 in the United States District Court for the Western District of Washington, challenging the constitutionality of his continued detention. App., *infra*, 5a. On March 31, 2000, a magistrate judge issued a report and recommendation in which he applied the standards set forth in the joint order of five judges of the district court in *Phan* v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999), for evaluating such constitutional challenges to continued detention beyond the initial 90-day removal period. App., *infra*, 5a, 7a-13a. The magistrate found that respondent's detention was unconstitutionally excessive because there was not a realistic chance that respondent would be removed to Cambodia in the foreseeable future. *Id.* at 6a, 9a-10a. He also concluded that a balancing of the government's interest in detaining respondent against respondent's flight risk and dangerousness also favored a finding that respondent's detention was excessive. *Id.* at 12a. The

magistrate judge recommended that the district court find that respondent's detention violates his substantive due process rights and order respondent released on conditions set by the INS. *Id.* at 13a. The magistrate recommended that the district court decline to defer the case for further consideration under the INS's review procedures, finding that the procedures did not comply with the directives contained in the *Phan* joint order. *Id.* at 12a-13a.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the magistrate judge had relied.

c. On May 24, 2000, the district court entered an order holding that, under *Ma*, respondent's continued detention is not authorized by statute. App., *infra*, 4a. The court also held that, in the alternative, respondent's detention violates substantive due process as set forth in the magistrate judge's report and recommendation. *Ibid.* The district court granted respondent's habeas corpus petition and ordered him released, subject to reasonable conditions set by the INS. *Ibid.*

d. On September 18, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35645
DC# CV-99-1740-MJP
Western Washington (Seattle)

SAROEUT OURK, PETITIONER-APPELLEE

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT-APPELLANT

[Filed: Sept. 18, 2000]

ORDER

Before: WALLACE, BEEZER and FERNANDEZ, Circuit Judges

Appellant's motions to hold this appeal in abeyance are denied.

A review of the record and appellant's response to the court's August 11, 2000 order to show cause why this appeal should not be summarily affirmed in light of *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3086 (U.S. July 5, 2000) (No. 00-38), indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See id.*

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C99-1740P

SAROEUT OURK, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, *ET AL.*,
RESPONDENTS

[Filed: May 24, 2000]

ORDER

This matter came before the Court on respondents' objections to the Report and Recommendation of the Honorable John L. Weinberg, United States Magistrate Judge. Judge Weinberg evaluated petitioner Sarouet Ourk's petition for writ of habeas corpus under the legal framework established by the judges of the Western District of Washington in *Phan v. Reno*, 56 F. Supp.2d 1149 (W.D. Wash. 1999). Judge Weinberg determined that it was highly unlikely that Mr. Ourk would be deported to Cambodia in the foreseeable future, and accordingly concluded that Mr. Ourk's continued detention violated his substantive due process rights. The Report and Recommendation recommends that the Court grant Ourk's petition and order him released from custody on conditions set by INS.

Shortly after Magistrate Weinberg issued his Report and Recommendation in this case, the Ninth Circuit Court of Appeals rendered its decision in *Ma v. Reno*, 2000 WL 358445 (9th Cir. Apr. 10, 2000). In *Ma*, the court reviewed INS's statutory authority to detain aliens under 8 U.S.C. § 1231(a)(6). *Id.* at *1. In the opinion, the Court of Appeals held:

> Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, we conclude that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

Id. at *4. This ruling applies to individuals whose deportation proceedings are governed by the permanent custody rules imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Id.* This Court will now review Mr. Ourk's petition in light of the Ninth Circuit decision in *Ma*.

Statutory Authority:

Mr. Ourk, like Mr. Ma, was ordered deported after April 1, 1997. INS's authority to detain Mr. Ourk is therefore governed by the IIRIRA section specifically interpreted by the Ninth Circuit, and *Ma* controls. Under *Ma*, the INS lacks statutory authority to detain Mr. Ourk beyond the statutory removal time because there is no reasonable likelihood that he will be deported to Cambodia in the reasonably foreseeable future. Interpreting the statute in accordance with *Ma*, Mr. Ourk should have been released ninety days after August 3, 1999. His continued detention is not authorized nor permissible under the statute.

Substantive Due Process:

In the alternative, this Court concludes that petitioner's continuing and indefinite detention violates his substantive due process rights under the analysis set forth in the Joint Order, and applied to this case in Judge Weinberg's Report and Recommendation. The Court therefore GRANTS the Petition for Habeas Corpus. Petitioner shall be released from INS custody within two business days after entry of this Order, subject to reasonable conditions set by INS. The Clerk is directed to send copies of this Order to counsel for both parties and to the Honorable John L. Weinberg.

Dated this 23 day of May, 2000.

/s/ MARSHA J. PECHMAN
MARSHA J. PECHMAN
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C99-1740P

SAROEUT OURK, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

REPORT AND RECOMMENDATION
TO GRANT WRIT OF HABEAS CORPUS

INTRODUCTION

This Petition is one of over two hundred 28 U.S.C. § 2241 petitions filed in this court that raise the same common legal issues: whether detention by the Immigration and Naturalization Service ("INS") of aliens who have been ordered deported to countries that refuse to receive them violates the aliens' substantive and procedural due process rights under the Fifth Amendment to the United States Constitution. On July 9, 1999, this court decided, in its Joint Order, the common legal issues presented in five "lead" cases. *See Phan v. Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999).[1] In the Joint Order, the court constructed a procedural

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[1] Hereinafter referred to as the "Joint Order."

framework for review and analysis of each petitioner's substantive and procedural due process claims. By separate orders, the U.S. District Judges who participated in the Joint Order applied the appropriate due process framework to each of their respective "lead" cases to determine whether continued detention violated each petitioner's constitutional rights.

This case has been referred to the undersigned U.S. Magistrate Judge, pursuant to Title 28 U.S.C. § 636(b)(1), Local Magistrates' Rules MJR 3 and MJR 4, and Federal Rule of Civil Procedure 72. (Doc. 1.) I have now carefully reviewed the Petition (doc. 3), the government's Status Report and Recommendation (doc. 9), petitioner's Response (doc. 12), the Administrative Record relating to petitioner (doc. 8), and the remaining record. In issuing this Report and Recommendation, I have applied the framework set forth in the Joint Order to the facts of this case and incorporate, by reference, the Joint Order, governing issues common to all petitioners. In so doing, I have found that petitioner's detention is excessive because it is unlikely that the government will be able to effectuate his deportation to Cambodia in the foreseeable future. Even if the court balances the petitioner's dangerousness and flight risk against the likelihood of deportation, his detention is still excessive. I therefore recommend that the court conclude that petitioner's continued detention violates his substantive due process rights.

Accordingly, the court should GRANT the Petition for Writ of Habeas Corpus and order petitioner released, on conditions to be set by the INS. Such conditions may include those set forth in 8 C.F.R. § 241.5(a).

FACTUAL BACKGROUND

Saroeut Ourk, a native and citizen of Cambodia who has been ordered deported to that country, fled Cambodia without a passport or official exit visa, and lawfully entered the United States as a refugee in 1984. (Doc. 8, R007, L006; doc. 12, Ex. A at 2.)[2] He later adjusted to lawful permanent resident status. (Doc. 8, R025.) He has been ordered deported due to his 1993 aggravated felony guilty plea conviction for Rape by Use of Drugs. (*Id.*, R005.)

Petitioner's criminal history is serious. In 1993, he was charged with seventeen counts of criminal conduct, involving allegations of kidnaping two children while armed with a firearm and with the intent to rape them; forcibly raping one of the children, and committing lewd acts against the other. (*Id.*, R009-021). A number of those counts were dismissed (*id.*, R088-089), and he was convicted by guilty plea for Rape by Use of Drugs (*id.*, R093). He was paroled in 1994, but that was revoked that same year (*id.*, R134), and again in 1998 (*id.*, R026).

The INS assumed custody over him in July 1999. (Doc. 12, Ex. A at 3.) It is unclear whether the INS has requested travel documents from Cambodia, but it is unlikely because of the lack of a repatriation agreement between the United States and Cambodia.[3] (*See id.*)

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[2] The Administrative Record is cited pursuant to the government's alphabetical and numerical pagination (*e.g.*, "R——" and "L——").

[3] The INS may have once asserted that petitioner was a citizen of Thailand. (*Compare* Doc. 8, R133, L015, *with id.*, L022, L028.) It appears that petitioner fled to Thailand as a refugee, prior to coming to the United States, and was never a citizen of Thailand. (*See id.*, R163, L030-031.)

Although it is extremely unlikely that petitioner will be deported in the near future, the INS continues to detain him.

DISCUSSION

As stated above, by Order of July 9, 1999, the court resolved the common issues presented by the indefinite detention cases. First, the court found that it had jurisdiction to consider the constitutionality of a petitioner's challenge to his detention, in the context of a § 2241 petition. Second, the court held that a petitioner need not exhaust administrative remedies before seeking a writ of habeas corpus pursuant to § 2241. Finally, the court set forth a due process framework to be applied in all pending indefinite detention cases.

The court's Joint Order is now the law of this case. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (stating that under the "'law of the case doctrine,' a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.") (citing *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)). Accordingly, I have not re-visited any of the above issues addressed by the Joint Order, and note that the INS has reserved its objections to that Order in this case.

In addition, I have considered, but not addressed, other circuit authority which the government cites in opposition to the Joint Order. Specifically, I have considered the Third Circuit Court of Appeals' decision in *Ngo (Lam) v. INS*, 192 F.3d 390 (3d Cir. 1999), the Fifth Circuit Court of Appeals' decision in *Zadvydas v. Underdown*, 185 F.3d 279, 297 (5th Cir. 1999), *petition*

for cert. filed, No. 99-7791, Jan. 11, 2000), and the Tenth Circuit Court of Appeals' decision in *Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000). Those decisions are not from this circuit, and are inconsistent with the holding in the Joint Order and this court's subsequent Orders.

With regard to the proper substantive due process framework, the Joint Order states that the critical inquiry is whether an alien's detention is excessive in relation to the government's legitimate interests in ensuring his removal and in protecting the public from dangerous felons. *Phan*, 56 F. Supp. 2d at 1156. The court concluded that:

> Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is "excessive" to detain an alien indefinitely if deportation will never occur.

Id.

The initial question is whether there is a realistic chance that petitioner will be deported to Cambodia in the foreseeable future. It is settled in this court that there is no realistic chance of Cambodian refugees being deported. The Hon. Robert S. Lasnik, in the lead case *Ma v. Reno*, No. C99-151L (W.D. Wash. 1999), ruled on September 29, 1999, that there was no realistic chance of Cambodian nationals being deported to Cambodia because of the lack of a repatriation agreement. (*See* doc. 12, Ex. E.) The government argues that diplomatic discussions with Cambodia since the date of the decision in *Ma* have been fruitful, making it realistic

that a repatriation agreement will be signed in the near future. (Doc. 9 at 4-5.) The government relies on declarations from James Hergen, an assistant Legal Advisor for Consular Affairs who has been personally involved in negotiations with Cambodia, to support its position. (*Id.*, Ex. B-E.)

The government's evidence does not suggest that the United States will likely establish a repatriation agreement with Cambodia in the foreseeable future. Moreover, even if a repatriation agreement were signed in the near future, there is no reason to believe that it would cover criminally convicted refugees, or that petitioner's deportation would quickly follow in the agreement's wake. The Hon. Marsha J. Pechman in *Tep v. INS*, No. C99-1161P (W.D. Wash. 1999) (*see* doc. 12, Ex. D), and the Hon. Barbara J. Rothstein in *Vath v. Smith*, C98-1363R (W.D. Wash. 1999), reached the same conclusion after considering similar declarations by Mr. Hergen.

It is therefore extremely unlikely that petitioner will be deported in the near future. Reading the Joint Order literally, this suggests that the court should not even examine the questions of petitioner's flight risk and dangerousness. *See Phan*, 56 F. Supp. 2d at 1156 ("[I]t is 'excessive' to detain an alien indefinitely if deportation will never occur."). Because petitioner might be detained forever absent court intervention, I recommend that the court find that his detention is "excessive" and in violation of his substantive due process rights.

Notwithstanding that recommendation, the court might interpret the Joint Order to require a balancing

of flight risk and dangerousness. I address those issues now.

The government presents little evidence that petitioner is a flight risk. His parents and siblings reside in the United States, and he may reside with his mother in Stockton, California, upon his release. (Doc. 8, R068; doc. 12, Ex. A at 6.) Although he violated his state probation on two occasions, there is no evidence that he attempted to evade authorities.

The government makes a stronger showing regarding petitioner's potential dangerousness based on his serious rape conviction. However, he served his time for that crime, and will be required to register as a sex offender if he is allowed to return to California. (*See* doc. 8, R069.) It is inappropriate for the INS to superimpose, upon the state's sanctions, confinement for an indefinite period, merely because the INS is unable to deport petitioner, and sees fit to detain him to prevent his commission of future offenses.

I note that in the lead case *Ma*, the petitioner there was involved in the killing of another gang member. Despite the extreme seriousness of this incident and conviction, Judge Lasnik held:

> Even if there were a realistic chance of deporting Ma, the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond. The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a danger to society, beyond the simple fact of his conviction. While the crime of which Ma was convicted is serious, it is not the kind that might

> justify indefinite detention. The record does not indicate his release with proper parole conditions would endanger the community.

(Doc. 12, Ex. E, "Order Granting Writ of Habeas Corpus," at 4-5 (footnote omitted).) If the government's showing of dangerousness in *Ma* was not sufficient to justify indefinite detention, the court should reach the same conclusion here. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.").

Thus, if petitioner's flight risk and dangerous are balanced against the government's much diminished interest in extending his detention further because of the unlikelihood of deportation in the foreseeable future, that balance still favors a finding of excessiveness. Accordingly, I recommend that the court find that the government's continued detention of petitioner is excessive and violates his substantive due process rights as guaranteed by the Fifth Amendment to the United States Constitution.

Because I recommend that the court find that petitioner's substantive due process rights have been violated, the court need not reach petitioner's procedural due process claim. *See United States v. Salerno*, 481 U.S. 739, 746 (1987). The court, however, is required to address this issue briefly, as the government requests that the court defer making a decision regarding petitioner's release, because his custody was reviewed in November 1999 under new INS procedures. (Doc. 9 at 13.) I recommend that the court not defer its decision in this case because, among other reasons, the new

procedures do not comply with the directives contained in the Joint Order.

CONCLUSION

I recommend that the court find that petitioner's detention is excessive because there is no realistic chance that the government will effectuate his deportation to Cambodia in the foreseeable future. Even if the court balances the petitioner's dangerousness and flight risk against the likelihood of deportation, his detention is still excessive. The court should conclude that petitioner's continued detention violates his substantive due process rights as a matter of law. Accordingly, petitioner should be released, within two business days after entry of the Order Granting Petition for Writ of Habeas Corpus, on conditions to be set by the INS. Such conditions may include those set forth in 8 C.F.R. § 241.5(a). A proposed order accompanies this Report and Recommendation.[4]

DATED this 31 day of March, 2000.

/s/ JOHN L. WEINBERG
JOHN L. WEINBERG
United States Magistrate Judge

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[4] In light of the nature of the case, and the court's direction to expedite it in every way possible, this court has shortened the usual time for objections and other responses to this Report and Recommendation. (*See* cover letter attached to this Report and Recommendation.)

(2)

No. 00-987

In The Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, JR., District Director of the Immigration and Naturalization Service, Seattle; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *Petitioners*

v.

SAROEUT OURK, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A WRIT OF *CERTIORARI*

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Federal Public Defender
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Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Section 1231(a)(6) of Title 8 of the United States Code provides that "[a]n alien ordered removed who is inadmissible . . . , removable [for a criminal offense], or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period," as that period is set out in 8 U.S.C. § 1231(a)(1)(A). The Immigration and Naturalization Service (INS) maintains that it has the authority to detain Saroeut Ourk pursuant to this provision, even though he is a long-time resident alien of this country, and it cannot deport him in the foreseeable future. The questions presented are:

1. Whether the Attorney General's construction of 8 U.S.C. § 1231(a)(6) violates the due process guarantee of the Fifth Amendment of the United States Constitution because it permits indefinite detention of an alien ordered deported whose deportation cannot be effectuated in the reasonably foreseeable future, even where the government's legitimate interests can be accomplished by less restrictive means.

2. Whether the narrow interpretation of § 1231(a)(6) suggested by the circuit court in *Ma v. Reno,* 208 F.3d 815 (9th Cir. 2000), to permit detention beyond the 90-day removal period in order to effectuate deportation, is correct because that interpretation avoids the constitutional problem raised by the Attorney General's interpretation and is not contrary to the "plain" intent of Congress.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ..... (i)

TABLE OF AUTHORITIES ..... (ii)

OPINIONS BELOW 1

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 4

TABLE OF AUTHORITIES

Cases — Page

Ma v. Reno, 208 F.3d 815 (9th Cir.), *pet. reh'g denied* (June 2, 2000), *cert. granted,* 121 S.Ct. 297, 69 USLW 3086 (U.S. Oct. 10, 2000) (No. 00-38) 2

Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *cert. granted,* 121 S.Ct. 297, 69 USLW 3249, 69 USLW 3257 (U.S. Oct. 10, 2000) (No. 99-7791) 3

Constitution and Statutes

U.S. Const. amend. V 1

8 C.F.R. § 241.4 1

8 U.S.C. § 1231(a)(3) 1

8 U.S.C. § 1231(a)(6) 1

8 U.S.C. § 1253(b) 1

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-987

JANET RENO, et al., *Petitioners*
v.
SAROEUT OURK, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A WRIT OF *CERTIORARI*

OPINIONS BELOW

The petition for *certiorari* correctly cites to the unreported district court and Court of Appeals opinions below. App. A, B & C to Pet. for Cert. 1a-13a. The district court order denying the government's motion to stay Mr. Ourk's release pending their appeal to the Ninth Circuit is not reported. App. A, *infra,* 1a.

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The petition for *certiorari* correctly cites the statutory and regulatory provisions involved in the case, 8 U.S.C. § 1231(a)(6), 8 C.F.R. §241.4, and § 1231(a)(3). The additional statutory provision governing Mr. Ourk's release is 8 U.S.C. § 1253(a)(1), which provides:

> Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who --
>
> > **(A)** willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the

> final order of the court,
>
> **(B)** willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,
>
> **(C)** connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or
>
> **(D)** willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

and 8 U.S.C. § 1253(b), which provides:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law[.]"

STATEMENT

The lower court opinions correctly set forth the facts of the case and the procedural background. Pet. for Cert. 1a-7a.

By writ of habeas corpus, Mr. Ourk challenged on statutory and federal constitutional grounds his ongoing detention by the INS because his deportation order cannot be effectuated in the reasonably foreseeable future, if ever. Both of the lower courts ruled in Mr. Ourk's favor. The Court of Appeals affirmed the grant of Mr. Ourk's writ of habeas corpus based on the circuit's decision in *Ma v. Reno,* 208 F.3d 815 (9th Cir.), *pet. reh'g denied* (June 2, 2000), *cert. granted,* 121 S.Ct. 297, 69 USLW 3086 (U.S. Oct. 10, 2000) (No. 00-38). In light of the grant of

certiorari in *Ma*, Mr. Ourk waives his right to file a Brief in Opposition. Mr. Ourk does not thereby waive any objections to the government's recitation of the facts which are either inaccurately stated in, or omitted from, the petition for *certiorari.*

ARGUMENT

The questions presented by this case are whether the Attorney General has the statutory authority to detain a long-time resident alien of the United States whose deportation order cannot be effectuated in the reasonably foreseeable future, if ever, and if so, whether that detention runs afoul of Mr. Ourk's substantive due process rights under the Fifth Amendment of the United States Constitution. These same issues are presented in *Ma v. Reno,* 208 F.3d 815, and *Zadvydas v. Underdown,* 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S.Ct. 297, 69 USLW 324, 69 USLW 3257 (U.S. Oct. 10, 2000) (No. 99-7791), in which the Court granted *certiorari* review on October 10, 2000.

Accordingly, Mr. Ourk does not waive any objections to the government's recitation of the proper legal analysis in Mr. Ourk's case. He nevertheless agrees with the government that consideration of the government's petition in this case should be held pending the Court's decision in *Ma* and *Zadvydas*.

CONCLUSION

The government's petition for *certiorari* should be held pending this Court's decision in *Reno v. Ma,* No. 00-38, and *Zadvydas v. Underdown,* No. 99-7791, and then disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted,

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January 3, 2001